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# Note: A Critique of Brazil's New Land Reform Law: How LEI No. 11.952 Disregards the Constituicao, International Law, and the Quilombolas

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# The William Mitchell Law Raza Journal

## -ARTICLE-

### ***NOTE: A CRITIQUE OF BRAZIL'S NEW LAND REFORM LAW: HOW LEI No. 11.952 DISREGARDS THE CONSTITUIÇÃO, INTERNATIONAL LAW, AND THE QUILOMBOLAS***

*João M da Fonesca\**

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. THE AMAZÔNIA LEGAL, ITS ENVIRONMENT, AND ITS PEOPLES .....	2
a) The Amazônia Legal .....	2
b) Expanding Business and Their Unsustainable Practices .....	3
c) The Quilombolas and Their Sustainable Practices .....	4
III. QUILOMBOLAS AND THE LAW .....	5
a) Quilombolas and Their Right to Land.....	5
b) Quilombolas and the Imperative of Culture.....	6
c) Problems with Enforcement .....	8
IV. LEI NO. 11.952 .....	10
a) Basic Facts .....	10
b) Lei No. 11.952 as a Provisional Measure and a Project of Conversion of Law, and as Law .....	10
V. LEI 11.952 AND ITS DISREGARD OF THE LAW .....	11
a) Lei 11.No. 952 in the Supremo Tribunal Federal .....	11
b) Lei No.11.952 and Its Disregard of ADCT 68 .....	12
c) Lei No. 11.952 and Its Disregard of Articles 215 and 216 of the Constituição, and International Law .....	13
VI. THE NEED TO WORK THE LAW TO MAKE IT JUST .....	14
a) How Lei No. 11.952 Exposes Brazil's Disregard of the Quilombolas .....	14
b) The Need for Legal Representation and the Role of Lawyer .....	15
c) An Opportune Time for Legal Action .....	16

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## I. INTRODUCTION

First peoples and tribal groups often struggle to protect their rights to land.<sup>1</sup> In Brazil, this is the struggle of the Quilombolas. The Quilombolas are descendants of slaves who freed themselves and established their own territory in Brazil.<sup>2</sup> Almost four hundred years after they first began to establish their own territory,<sup>3</sup> they finally secured their definitive legal right to the land they currently occupy.<sup>4</sup> Even though this right was written in the Constituição of 1988 under the specific commands of article 68 of the Act of the Transitory Constitutional Dispositions<sup>5</sup> (ADCT 68),<sup>6</sup> this right to land is hardly enforced.<sup>7</sup>

In contrast to ADCT 68, Brazil's recent land reform law—Lei No. 11.952— is being enforced at full force and is already producing impressive results.<sup>8</sup> Questions inevitably arise as to why Lei No. 11.952—which provides legal commands that are not directly under the Constituição—is successful and ADCT—that imposes a clear constitutional command—is not.<sup>9</sup> This paper will propose that the ADCT is not being enforced because of a series of laws and legal proceedings that hinder its implementation.<sup>10</sup>

Serious questions exist, however, as to the constitutionality of Lei No. 11.952.<sup>11</sup> Lei No. 11.952 is currently being challenged in Brazil's Federal Supreme Court<sup>12, 13</sup> In her Direct Action of Unconstitutionality<sup>14</sup> (ADI), Brazil's General Prosecutor of the Republic<sup>15</sup> argued that Lei No. 11.952, among other issues, threatens Quilombolas land rights.<sup>16</sup> She argued that Lei No. 11.952 seems to suggest that Quilombolas territory can be regularized in favor of third parties.<sup>17</sup>

In addition to imparting definitive land rights to the Quilombolas, the Constituição also seeks to protect and promote the cultural and sustainable practices of the Quilombolas.<sup>18</sup> But title to land under Lei No. 11.952 is contrary to these principles because it leads to the fragmentation of the Quilombolas communities.<sup>19</sup> Given the aggressive economic forces that

have strong interests in their land,<sup>20</sup> Quilombolas may cede their title to land to these forces. The eventual fragmentation of their communities ultimately affects the development of the culture and sustainable practices.<sup>21</sup>

In view of the disadvantages that Lei No. 11.952 creates, and the government's failure to enforce the Quilombolas rights under the law, this work also advocates for a greater participation of lawyers to ensure that the Quilombolas have their day in Court so the ADCT can be effectively carried out.<sup>22</sup> The need to take legal action comes during an opportune time: Brazil has recently passed two decrees that create an incentive for the Quilombolas to maintain a collective title to land and the development of their cultural and sustainable practices.<sup>23</sup>

Part II of this work gives a background on the scenario where all of this is taking place: the Amazônia Legal.<sup>24</sup> Part III discusses Quilombolas rights to land under various laws, and how the laws strive to protect and promote their culture; it also explains why these laws have not been substantially enforced.<sup>25</sup> Part IV explains the development of Lei No. 11.952 in view of Quilombolas rights.<sup>26</sup> Part V demonstrates how Lei No. 11.952 disregards the Constituição and international instruments.<sup>27</sup> Part VI highlights the need Quilombolas have for legal assistance, and demonstrates how with increased legal representation, the Quilombolas can succeed in enforcing their already existing rights under the law.<sup>28</sup>

## **II. THE AMAZÔNIA LEGAL, ITS ENVIRONMENT, AND ITS PEOPLES**

### **A. The Amazônia Legal**

Lei No. 11.952 operates exclusively within the Amazônia Legal<sup>29</sup> region.<sup>30</sup> The term "Amazônia Legal" refers to the region of Northern Brazil that is often the target of government-led development policies.<sup>31</sup> In 1953, Lei 1.806 was the first law to define the Amazônia Legal

region.<sup>32</sup> Lei 1.806 instituted special economic policies for the states of Amazonas and Pará, the then-federal territories of Acre, Amapá, Guaporé, and Rio Branco, and part of the states of Mato Grosso, Goiás, and Maranhão.<sup>33</sup> Complementary law (CL) No. 124 defines the current Amazônia Legal geopolitical arrangement.<sup>34</sup> CL No. 124 established that Lei No. 11.952 should apply to the states of Acre, Amapá, Amazonas, Mato Grosso, Rondônia, Roraima, Tocantins, Pará, and part of the state of Maranhão.<sup>35</sup>

The Amazônia Legal is of extreme importance to Brazil and the world because at least 60 percent of the Amazon Forest<sup>36</sup> is in the region.<sup>37</sup> The Amazon Forest contains hundreds of trillions of tons of carbon.<sup>38</sup> Its vegetal coverage releases roughly seven trillion tons of water into the atmosphere through evaporation, and its rivers release 20 percent of all water that is disposed by rivers into the ocean.<sup>39</sup> In addition, Brazil's Amazon Forest contains the world's richest biodiversity,<sup>40</sup> which provides for the socio-economic development of the people in the region.<sup>41</sup> It is essential to human progress because it provides resources for the development of important medicines<sup>42</sup> and for products derived from sustainable economic practices.<sup>43</sup> The Amazon Forest hosts many groups of first peoples, and traditional peoples whose economic practices embody the fundamental principles of sustainable development.<sup>44</sup>

### **B. Expanding Businesses and Their Unsustainable Practices**

Recently, new businesses have expanded their agricultural practices into Amazônia Legal territory.<sup>45</sup> These practices consist mostly of soy production, but corn, rice, and cotton are also produced.<sup>46</sup> Another powerful industry in the Amazônia Legal region is cattle ranching, which has grown considerably since the 1990s.<sup>47</sup> These practices substituted the once prosperous rubber industries,<sup>48</sup> and once more predominant timber and mineral extraction industries.<sup>49</sup>

An important issue in the soy and cattle industries is their impact on the environment.<sup>50</sup> These practices devastate the rich biodiversity of the Amazon Forest,<sup>51</sup> and contribute to global warming as they clear the forest through slash and burn techniques to create space for their economic practices.<sup>52</sup> Slash and burn is estimated to be responsible for more than 70 percent of Brazil's and 20 percent of the world's carbon dioxide emissions.<sup>53</sup> These economic practices further contribute to global warming because deforestation reduces the Amazon Forest's vital capacity to absorb carbon dioxide emissions.<sup>54</sup>

### **C. The Quilombolas and Their Sustainable Practices**

In addition to these industries, there are also many Quilombolas in the Amazônia Legal.<sup>55</sup> The Quilombolas are descendants of the slaves that freed themselves to form their own territory in places of difficult access called Quilombos, far from urban centers.<sup>56</sup> During the Transatlantic slave trade,<sup>57</sup> roughly fifteen million people were taken from Africa to the Americas, of which six million were taken to Brazil.<sup>58</sup> Of these, at least twenty-five thousand were brought to the Amazônia Legal region either directly from Africa or through internal trade in Brazil.<sup>59</sup> Though they were free in practice, the Quilombolas were only free under the law upon the passage of Lei Áurea in May 13, 1888,<sup>60</sup> making Brazil the last country in the Americas to abolish slavery.<sup>61</sup> Today, there are up to five thousand Quilombolas communities in Brazil.<sup>62</sup> Data does not reveal the precise number of Quilombolas communities in the Amazônia Legal.<sup>63</sup> However, there are accounts of Quilombolas communities in all but two of the Amazônia Legal states.<sup>64</sup> To have a better idea of how many communities there may be, in the state of Pará alone there are at least 240 Quilombolas communities.<sup>65</sup>

The Quilombolas are of particular importance to the environment because of their sustainable practices.<sup>66</sup> Because of these practices, the Quilombolas can be referred to as the

keepers of the Amazon Forest.<sup>67</sup> For example, the Quilombolas have found subsistence through the many food products they were able to cultivate and extract from the Amazon Forest.<sup>68</sup> The more the sustainable practices of the Quilombolas and that of other groups with similar practices are understood, practiced, and diffused, the more the need to preserve the Amazon Forest will be recognized. Coming to this consciousness and promoting it means that the Amazon Forest will continue to host its rich biodiversity,<sup>69</sup> to exercise its crucial biological functions,<sup>70</sup> to provide subsistence to those who live there,<sup>71</sup> and to provide the resources needed by those who live outside of it.

### **III. QUILOMBOLAS AND THE LAW**

#### **A. Quilombolas Right to Land**

The Quilombolas affirmative right to land was established in 1988 under Brazil's current Constituição in the form of an ADCT.<sup>72</sup> The ADCTs were created to complete Brazil's transition from the constitutional regime of 1967 to the regime of the Constituição of 1988.<sup>73</sup> They were designed to solve specific issues.<sup>74</sup> ADCT 68 was created to recognize the Quilombolas definitive right to property.<sup>75</sup>

The inclusion of ADCT 68 to the Constituição was in great part the result of the efforts of the Black Movement<sup>76</sup> that pressed that the right to land be recognized as an essential human right of all Brazilians.<sup>77</sup> This affirmative right to land is necessary to the Quilombolas because it attempts to subvert some of the severe setbacks created by slavery.<sup>78</sup> Because the Quilombolas are significantly deprived from access to the legal system,<sup>79</sup> the importance of ADCT 68 cannot be overemphasized.



Though ADCT 68 is supposed to be straightforward,<sup>80</sup> conflicts arise as to its precise meaning.<sup>81</sup> It is certain, however, that they are entitled to a collective and inalienable right to land.<sup>82</sup> ADCT 68 reads, “The definitive right of property of the remnants of the communities of [Q]uilombos that are occupying their lands is recognized, and it is the State’s duty to issue their respective titles.”<sup>83</sup> Domestic legislation carrying out ADCT 68 and legal experts overwhelmingly support that “definitive property” means that they are entitled to the inalienable title to that land.<sup>84</sup> There is also a general understanding that the “remnants of communities of quilombos” refers to collective communities of Quilombolas that were formed by the first Quilombolas.<sup>85</sup>

International law instruments also support the Quilombolas collective and inalienable title to land. The International Labor Organization<sup>86</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) establishes the Quilombolas’ right of self-identification and recognizes their title to land as an essential right.<sup>87</sup> ILO No. 169 considers land important because of its relationship with the community’s cultural development.<sup>88</sup> This cultural development is, in turn, a source of human cooperation and understanding.<sup>89</sup> Cultural development is also directly tied to economic development;<sup>90</sup> and because the Quilombolas economic practices are sustainable, their culture is intrinsically connected to ecological harmony.<sup>91</sup>

### **B. Quilombolas and the Imperative of Culture**

The Brazilian Constituição recognizes the importance of the Quilombolas culture.<sup>92</sup> Article 215 charges the government with the duty to protect the cultural manifestations of Afro-Brazilians.<sup>93</sup> Article 215 also establishes the National Plan of Culture<sup>94</sup>, which seeks to protect and promote the Brazilian cultural patrimony.<sup>95</sup> Article 216 defines cultural patrimony as “material and

immaterial assets” that are the vehicle of the “identity, action, and memory of the different groups that form Brazilian society.”<sup>96</sup>

Quilombolas lands are directly tied to the notion of cultural patrimony. Decreto No. 4.887 further provides that the Palmares Cultural Foundation<sup>97</sup> “must institute the process for purposes of [registration, protection] and preservation of the [B]razilian cultural patrimony.”<sup>98</sup> It also states that upon completion of the title registration process the “documents and the sites retaining the remnant history of the old quilombos . . . .” shall be “communicated to the IPHAN.”<sup>99</sup>,<sup>100</sup>

The Quilombolas culture gains additional recognition under UNESCO’s<sup>101</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, and UNESCO’s Universal Declaration on Cultural Diversity. The Declaration on Diversity defines culture as essential to human dignity,<sup>102</sup> and advocates for its “wide diffusion.”<sup>103</sup> Culture is defined as art, literature, a way of life, and encompassing “value systems, traditions and beliefs.”<sup>104</sup>

Culture is beneficial to the Quilombolas and to those outside their communities. It establishes a basis for peace and security in our world,<sup>105</sup> and it benefits current and future generations.<sup>106</sup> It also provides a basis for “creative capacities that sustain public life,”<sup>107</sup> and a “more satisfactory intellectual, emotional, moral, and spiritual existence.”<sup>108</sup>

The Convention on Cultural Expressions further develops these principles and demonstrates why the progress of the Quilombolas culture is so important to those outside their communities.<sup>109</sup> It recognizes cultural diversity as a “defining characteristic of humanity.”<sup>110</sup> Culture constitutes humanity’s common heritage and therefore “should be cherished and preserved for the benefit of all.”<sup>111</sup> It benefits humanity because it increases our ranges of choices and nurtures our capacities and values, and “therefore is a mainspring” for the

sustainable development of our communities.<sup>112</sup> As important, culture is also valuable because it enhances “the status and role of women” in society.<sup>113</sup>

### **C. Problems with Enforcement**

Though their right to land under the Constituição was secured more than twenty years ago,<sup>114</sup> under a legal command that was clear and specific,<sup>115</sup> enforcement of this right remains a priority to many Quilombolas communities today.<sup>116</sup> Since 1988, only ninety-six Quilombolas territories obtained title to land.<sup>117</sup> According to some estimates, this number represents roughly 3 percent of the Quilombolas communities in Brazil.<sup>118</sup> As troubling is the fact that, recently, title registration rates have decreased.<sup>119</sup>

A background about the application of ADCT 68 explains in part why it has been difficult to enforce it. Enforcement of ADCT 68 only began in 1995 through INCRA’s administrative rule<sup>120</sup> 307.<sup>121</sup> It was not until 1999 that an institution, the Palmares Cultural Foundation, was directly charged with the enforcement of ADCT 68.<sup>122</sup> Provisional measure<sup>123</sup> (MP) 1.911 explicitly entrusted the Ministry of Culture<sup>124</sup> (MinC) with the capacity to enforce the ADCT.<sup>125</sup> In the same year it was granted this power, the MinC delegated its power to the Palmares Cultural Foundation.<sup>126</sup> The power to enforce the ADCT was granted to the Palmares Cultural Foundation eleven years after it was created.<sup>127</sup>

After 2001, the government passed two decrees to carry out ADCT 68. The first decree, Decreto No. 3.912, was problematic because it severely impaired the Quilombolas ability to acquire title to land.<sup>128</sup> It required that the Quilombolas prove that they occupied the land in 1888 and in 1988.<sup>129</sup> The time-frame requirement was justified on the basis that 1888 was the date that slavery ended and 1988 the date that the Constituição was instituted.<sup>130</sup> The Quilombolas and their advocates perceived this provision as arbitrary.<sup>131</sup> Because of this

arbitrary provision, and its incompatibility with the ILO Convention No. 169 self-identification requirement, Decreto No. 4.887 revoked Decreto No. 3.912.<sup>132</sup>

While Decreto No. 4.887 was well received by the Quilombolas,<sup>133</sup> others did not react in the same way. Decreto No. 4.887 was favorable to the Quilombolas as it carried out ADCT 68,<sup>134</sup> and respected their right of self-identification.<sup>135</sup> On the other hand, critics of Decreto No. 4.887 disagreed with the very points that benefited the Quilombolas. In 2003, ADI No. 3.239 challenged the constitutionality of Decreto No. 4.887.<sup>136</sup> Some legislative actions tried to suspend Decreto No. 4.887,<sup>137</sup> while others tried to alter its effect<sup>138</sup> or replace it in its entirety.<sup>139</sup> Even the news media that is supposed to be neutral systematically criticized Decreto No. 4887.<sup>140</sup> While these direct attacks against the Quilombolas met serious resistance and did not go too far,<sup>141</sup> a more subtle but effective administrative rule hindered the Quilombolas' ability to acquire land.<sup>142</sup> INCRA's administrative rule No. 49 made title registration process more burdensome and bureaucratic.<sup>143</sup> In 2009, INCRA's administrative rule No. 56 substituted and revoked administrative rule No 49.<sup>144</sup> Just thirteen days after administrative rule No. 56 passed, administrative rule No. 57 came into force and reinstated its terms.<sup>145</sup>

The delay in granting the Palmares Cultural Foundation powers to carry out the ADCT explains in part why its implementation has not been successful.<sup>146</sup> Conflicting laws and regulations that at times favor but other times hinder the Quilombolas ability to obtain title to land, also explain this lack of success. Even if Decreto No. 4.887 endures the ADI No. 3.239, enforcement of the ADCT remains uncertain unless serious legal actions are taken to secure Quilombolas rights.<sup>147</sup>

**IV. LEI NO. 11.952****A. Basic Facts**

Lei No. 11.952 will regulate 67 million hectares of land,<sup>148</sup> which is the equivalent to 13.42 percent of the Amazônia Legal territory.<sup>149</sup> This area is roughly the size of the state of Texas.<sup>150</sup> The INCRA estimated that three-hundred thousand families will benefit from this land reform measure.<sup>151</sup>

Before it became law, Lei No. 11.952 went through two related but distinct legislative phases. In the first phase, Lei No. 11.952 was a provisional measure.<sup>152</sup> The second phase, which took an opposite direction from MP No. 458, was the legislative process of becoming a law, commonly referred to as project of conversion of law (PLV).<sup>153</sup>

**B. Lei No. 11.952 as a Provisional Measure, a Project of Conversion of Law, and as Law**

MP No. 458's purpose was to solve three issues in the Amazônia Legal: judicial instability that permitted the illegal possession of land, conflicts over land, and the advancement of deforestation.<sup>154</sup> To that end, it sought to speed up regularization of public rural areas and the distribution of part of federal lands located in urban areas.<sup>155</sup> It also aimed to improve the ability of Brazil's Ministry of Agrarian Development (MDA)<sup>156</sup> and the INCRA<sup>157</sup> to perform these functions.<sup>158</sup>

MP No. 458 was beneficial to the Quilombolas. It expressly protected their land from regulation by third parties.<sup>159</sup> In doing so it gave the Quilombolas a de facto right to land since it prohibited others from occupying their land. By default, the Quilombolas would become the primary owners of their land. This de facto right, though not the best option, gave the

Quilombolas some sense of ownership over the land they occupy, particularly in light of the fact that their rights under the ADCT 68 are barely enforced.

However, after MP No. 458 was issued, Brazil's Congress removed the provision that protected Quilombolas land from regulation by third parties.<sup>160</sup> It also added a new section that potentially permitted the regularization of their land by third parties.<sup>161</sup> Congress removed MP's explicit protection because, as demonstrated in the travaux préparatoires, it wanted to regularize Quilombolas land.<sup>162</sup>

On June 25, 2009, President Luis Inácio "Lula" da Silva vetoed parts of the Congress's PLV, but he did not alter any provisions corresponding to Quilombolas land rights.<sup>163</sup> As such, Article 4, section 2 only expressly protected lands belonging to the First Peoples. Article 4, section 2 also provided that regularization of Quilombolas and traditional people's territory could be granted under the terms of the law so long as specific legislation so permits.

## **V. LEI NO. 11.952 AND ITS DISREGARD OF THE LAW**

### **A. Lei No. 11.952 in the Supreme Federal Tribunal**

Less than two weeks after the Lei 11.952 became law, Brazil's General Prosecutor,<sup>164</sup> Deborah Duprat, challenged its constitutionality in Brazil's highest appellate court.<sup>165</sup> She argued that Lei No. 11.952 infringed on the land rights of traditional peoples and the Quilombolas, threatened the environment, and favored people who illegally obtained land and engaged in illegal activities in the Amazônia Legal.<sup>166</sup> With respect to the Quilombolas, she requested that the Court interpret Article 4, section 2 of Lei No. 11.952 in a way that prohibits the regularization of Quilombolas territory in favor of third parties.<sup>167</sup>

Her request rested on two premises. First, MP No. 458 expressly protected the Quilombolas, but the current version of Lei No. 11.952 does not do so.<sup>168</sup> This modification, the General Prosecutor stated, “seemed to suggest that that lands occupied by Quilombolas and traditional communities can be regularized in favor of third parties.”<sup>169</sup> Second, the General Prosecutor argued that the Quilombolas rights to land are well settled under domestic law and international law.<sup>170</sup> To that end, she compared the Constituição with the ILO Convention No. 169, the Declaration on Diversity, and the Convention on Cultural Expressions.<sup>171</sup>

The General Advocates of the Union<sup>172</sup> disagreed with this and other points raised by the General Prosecutor.<sup>173</sup> The Supreme Court has not stated when it will rule on these issues. It may be years before it reaches a final decision on this matter.

### **B. Lei No. 11.952 and Its Disregard of ADCT 68**

Lei No. 11.952 also suggests that the regularization of land by the Quilombolas themselves is permissible, because they can meet the requisites under Lei 11.952, and because specific regulations addressing Quilombolas rights do not provide otherwise.<sup>174</sup> However, this is in disaccord with the Constituição.<sup>175</sup> While title to land under Lei No. 11.952 is individual and alienable,<sup>176</sup> title to land under ADCT 68 is collective and inalienable.<sup>177</sup>

Brazil’s Black Movement and the drafters of the Constituição understood the need for a collective and inalienable title to land; that is why the collective, and inalienable—and not the individual and alienable—title to land was provided for in the text of ADCT 68.<sup>178</sup> Legal scholars and laws passed addressing Quilombola rights also support this view.<sup>179</sup>

A practical problem exists when the current situation of the Quilombolas is taken into account. Because they have been deprived of their right to land under the Constituição,<sup>180</sup> title to land under Lei No. 11.952, though not the best option, may nonetheless become a reality. Unlike

the ADCT, the government is committed to enforcing Lei No. 11.952.<sup>181</sup> This is beneficial to the extent that the MDA can effectuate title registration as provided under Decreto No. 6.813.<sup>182</sup> But given the history of title registration under the ADCT,<sup>183</sup> and the fact that Lei No. 11.952 will grant title to land within four months after the petition for registration is made,<sup>184</sup> the individual Quilombola may favor regulation under Lei No. 11.952 over the ADCT.

Nothing in current Quilombolas legislation addressing Quilombolas land rights would prevent this from happening. ILO Convention No. 169 may even support such initiative by the Quilombolas. Article 7, paragraph 1 gives the Quilombolas independence and control over their own affairs.<sup>185</sup> Even so, the Quilombolas choice for regularization under the terms of Lei No. 11.952 is not due to their own free choice, but rather heavily influenced by their inability to obtain land under ADCT. The individual and alienable title to land will have serious implications on Quilombolas land rights in the long term. In the long-term, Lei No. 11.952 will subject the Quilombolas to the aggressive real estate market in the region. Ultimately, this may result in the fragmentation of the Quilombolas communities as they begin to cede their territory to these forces. The peoples of the region, the environment, and those outside of it cannot afford this risk.

### **C. Lei No. 11.952 and its Disregard of Articles 215 and 216 of the Constituição, and International Law**

In permitting the alienable and individual title to land, Lei No. 11.952 also derogates constitutional principles and international instruments that protect and promote culture and sustainable development.<sup>186</sup> Because title to land under Lei No. 11.952 can ultimately result in the fragmentation of their communities, the preservation and progress of their culture will suffer. Domestic and international law have demonstrated that there is a deep connection between land



ownership and the preservation of culture. This connection applies to the Quilombolas as well. Thus, Lei No. 11.952 is in violation of article 215 of the Constituição that entrusts the government with the duty to support and encourage the progress of their culture.<sup>187</sup> Furthermore, the land the Quilombolas occupy is the physical foundation of the cultural practices of the Quilombolas. As such, it is closely connected to the precepts of Article 216 as the land arguably becomes the vehicle of their identity.<sup>188</sup> Decreto No. 4.887 supports this view as it deems Quilombolas land a “cultural patrimony” once title registration is complete.<sup>189</sup>

The fragmentation of the Quilombolas community is also contrary to international instruments. Lei No. 11.952 defeats the purpose of ILO Convention No. 169 because it circumscribes a goal of the Convention: to provide for the development of culture.<sup>190</sup> For the same reason, it also is in disaccord with the Convention on the Protection of Diversity and the Declaration on Diversity.<sup>191</sup>

As these international law instruments demonstrate, the plight of the Quilombolas ultimately affects us all. If sustainable cultural practices cease to develop, we will cease to understand important practices. Our knowledge of the food, medicine, and other works the Quilombolas create, will cease to expand. This ultimately prevents us from advancing our understanding of the opportunities for sustainable development available in the Amazon Forest and its natural resources.

## **VI. THE NEED TO WORK THE LAW TO MAKE IT JUST<sup>192</sup>**

### **A. How Lei No. 11.952 Exposes Brazil’s Disregard of the Quilombolas**

Lei 11.952 also exposes the government’s lack of commitment to the Quilombolas and the laws that support their rights. Lei No. 11.952—a law that is not of a constitutional nature—is

already being implemented at full speed,<sup>193</sup> while the ADCT—that is of a constitutional nature and was passed more than twenty years ago in response to the harms slavery created<sup>194</sup>—is hardly implemented.<sup>195</sup>

It is problematic that the Quilombolas are more likely to obtain title to land under the terms of Lei No. 11.952 than under ADCT 68.<sup>196</sup> This demonstrates a serious disregard for the Quilombolas, established constitutional principles, and international law instruments. The Constituição, as the highest law of the land, should be respected and enforced. Especially when it is a clear and specific command that responds to past injustices to the Quilombolas like ADCT 68.<sup>197</sup> International law instruments that espouse key principles for peace, understanding, and preservation of the environment are also disregarded.<sup>198</sup>

This apparent discrepancy between the government's lack of commitment to enforce ADCT 68 in view of the government's willingness to enforce Lei No. 11.952, demonstrates that it is possible for the government to take action and secure the Quilombolas land rights under ADCT 68.

### **B. The Need for Legal Representation and the Role of Lawyers**

According to Brazil's Minister of Racial Equality Edson Santos, among the historically excluded groups in Brazilian society, the Quilombolas represent the group with the least access to legal services.<sup>199</sup> This explains in part why the Quilombolas are unable to secure their definitive right to land even though ADCT 68 was passed in the late 1980s. But with enough legal support, in cooperation with key organizations that are already dedicated to their cause,<sup>200</sup> the Quilombolas can turn their right to definitive property into a reality.

The United Nations's Basic Principles on the Role of Lawyers recognizes the importance of lawyers to the Quilombolas plight for land.<sup>201</sup> The Principles on the Role of Lawyers

recognizes the right to legal services as necessary for the adequate protection of human rights.<sup>202</sup> It also recognizes the important role that lawyers play in securing these rights.<sup>203</sup> The Principles on the Role of Lawyers highlights that “special attention” should be given to groups who would otherwise lack access to lawyers to protect their rights.<sup>204</sup>

As Santos noted, lawyers can make a great impact in the Quilombolas struggle for land. Encouraging data suggests that generally, once the Quilombolas take their claims to court, they usually prevail.<sup>205</sup> This is not a surprise. The Quilombolas right to land is founded on principles of justice, Brazil’s own Constituição, and international instruments to which it is a party.<sup>206</sup> These laws provide for a definitive right to land, and for the progress of their culture and sustainable practices.<sup>207</sup> Lawyers are therefore equipped with compelling legal and public policy arguments to challenge agencies, regulations, and laws that hinder the application of ADCT 68.

### **C. An Opportune Time for Action**

Lawyers who join the cause will do so during an opportune time. Two relevant Decretos support the Quilombolas cause. First, Decreto No. 6.040 of February 2007 instituted the National Plan of Sustainable Development of the Traditional Peoples and Communities.<sup>208 209</sup> The Plan of Sustainable Development recognizes their land as essential for the development of their culture.<sup>210</sup> It also recognizes the Quilombolas as a group of people living under a traditional territory.<sup>211</sup> The Decreto defines sustainable development as “the balanced use of the natural resources, directed toward the betterment of the quality of life of present generations, guaranteeing the same possibilities [for] future generations.” The main goal of the Plan of Sustainable Development is to promote the sustainable development of the traditional peoples,<sup>212</sup> including the Quilombolas.<sup>213</sup> To that end, the Plan of Sustainable Development seeks to secure the Quilombolas collective right to land,<sup>214</sup> and to strengthen their communities.<sup>215</sup>

Brazil's racial equality decree of June 2009 adds even more momentum to the enforcement of the Quilombolas right to land.<sup>216</sup> Decreto No. 6.872 promotes the sustainable development of the Quilombolas;<sup>217</sup> public politics to support them;<sup>218</sup> title registration;<sup>219</sup> the protection of their land;<sup>220</sup> the preservation of the environmental, cultural, material, and immaterial patrimony of the Quilombolas;<sup>221</sup> and the study of their socio economic status.<sup>222</sup> It also seeks to increase public assistance, and support their productive activities, with a focus on a "diversified production" and commercialization.<sup>223</sup> It aims to stimulate the study of their culture<sup>224</sup> and to stimulate a cultural exchange between the Quilombolas from Brazil with the communities in Africa.<sup>225</sup> Lastly, it provides for the incentive of the sustainable management of the Quilombola land.<sup>226</sup>

These decrees and their encouraging provisions reiterate the notion that the Quilombolas right to land is collective and that it needs to be definitive for the preservation of their culture and sustainable practices. They also demonstrate that the Quilombolas are gaining more visibility in national scenario and are securing laws that further their cause. With proper legal representation the Quilombolas will acquire their definitive title to property and continue to develop their sustainable economic and cultural practices to their own benefit and to those outside their communities.

## CITATIONS

<sup>1</sup> See, e.g., Marguerite L. Spencer, *A White American Female Civil Rights Attorney in New Zealand: What Maori Experience(s) Teach me About the Cause*, 28 WM. MITCHELL L. REV. 255, 279–80 (2001) (discussing grievances of indigenous peoples disposed of their land and culture).

<sup>2</sup> See *infra* notes 55–61 and accompanying text.

<sup>3</sup> See Ronaldo Vainfas, *Deus Contra Palmares*, in *LIBERDADE POR UM FIO: HISTÓRIA DOS QUILOMBOS NO BRASIL* 60, 62–63 (João José Reis & Flávio dos Santos eds., 1996).

<sup>4</sup> SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *COMUNIDADES QUILOMBOLAS: DIREITO À TERRA* 9 (2002). See also *infra* note 77 and accompanying text.

<sup>5</sup> English for “Ato das Disposições Constitucionais Transitórias.”

<sup>6</sup> See *infra* notes 76–79 and accompanying text.

<sup>7</sup> See *infra* Part III.C.

<sup>8</sup> See *infra* note 181 and accompanying text.

<sup>9</sup> See *infra* Part VI.A.

<sup>10</sup> See *infra* Part III.C.

<sup>11</sup> See *infra* Part V.A–B.

<sup>12</sup> English for “Supremo Tribunal Federal” [hereinafter Supreme Court]. This is Brazil’s highest appellate court.

<sup>13</sup> See *infra* Part V.A.

<sup>14</sup> English for “Ação Direta de Inconstitucionalidade.”

<sup>15</sup> English for “Procuradora Geral da República” [hereinafter General Prosecutor].

<sup>16</sup> See *infra* Parts IV.A, V.

<sup>17</sup> See *infra* Parts IV.A, V.

<sup>18</sup> See *infra* Part III.A–B.

<sup>19</sup> See *infra* Part IV.

<sup>20</sup> See *infra* Parts II.B, V.

<sup>21</sup> See *infra* Part V.

<sup>22</sup> See *infra* Part VI.

<sup>23</sup> See *infra* Part VI.C.

<sup>24</sup> See *infra* Part II.

<sup>25</sup> See *infra* Part III.

<sup>26</sup> See *infra* Part IV.

<sup>27</sup> See *infra* Part V.

<sup>28</sup> See *infra* Part VI.

<sup>29</sup> Portuguese for “Legal Amazon.”

<sup>30</sup> Lei No. 11.952, de 25 de junho de 2009, D.O.U. de 26.06.2009, available at [http://www.planalto.gov.br/ccivil\\_03/\\_ato2007-2010/2009/lei/111952.htm](http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/lei/111952.htm). (Brazil).

<sup>31</sup> See, e.g., Decreto No. 1.141, de 5 de maio de 1994, D.O.U. de 20.05.1994, available at [http://www.planalto.gov.br/ccivil\\_03/decreto/Antigos/D1141.htm](http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D1141.htm). (Brazil).

<sup>32</sup> See Lei No. 1.806, de 6 de janeiro de 1953, D.O.F.C. de 07.01.1953. (Brazil).

<sup>33</sup> *Id.* at art. 2. Article 2 did not specifically use the term *Amazônia Legal*; it used the term *Amazônia brasileira* instead. See *id.* However, it is a common understanding that it entails the *Amazônia Legal* region. The states of Rondônia and Roraima were originally not listed under article two of Lei 1.806. See *id.* Rather, the then-states of Guaporé and Rio Branco were listed. *Id.* In 1956, the federal territory of Guaporé changed its name to Rondônia. Lei No. 2.731, art. 1, de 17 de fevereiro de 1956, D.O.U. de 21.02.1956, available at <http://www.lexml.gov.br/urn/urn:lex:br:federal:lei:1956-02-17;2731>. (Brazil). In 1962, the federal territory of Rio Branco changed its name to Roraima. Decreto No. 4.182, art. 1, de 13 de dezembro de 1962, D.O.F.C. de 18.06.1958, available at <http://www.lexml.gov.br/urn/urn:lex:br:federal:lei:1962-12-13;4182>. (Brazil). In 1975, Lei No. 5.173 included the state of Amapá, the state of Goiás and part of the state of Mato Grosso to the list of the *Amazônia Legal* states. Lei No. 5.173, art. 2, de 27 de outubro de 1966, D.O.F.C. de 31.10.1966. (Brazil). In 1977, CL No. 31 included the full state of Mato Grosso because the part that was originally not part of the *Amazônia Legal* became a state of its own. Lei Complementar No. 31, art. 1, de 11 de outubro de 1977, D.O.U. de 12.10.1977, available at <http://www.lexml.gov.br/urn/urn:lex:br:federal:lei:complementar:1977-10-11;31>. (Brazil). Today, the state of Goiás is no longer a *Amazônia Legal* state, but rather the state of Tocantins that constitutes part of what was

then the full state of Goiás. *See* Ato das Disposições Constitucionais Transitórias, art. 13, § 1, de 5 de outubro de 1988, D.O.U. de 05.10.1988, *available at*

[http://www.planalto.gov.br/ccivil\\_03/constituicao/constitui%C3%A7ao.htm](http://www.planalto.gov.br/ccivil_03/constituicao/constitui%C3%A7ao.htm). (Brazil).

<sup>34</sup> *See* Lei Complementar No. 124, de 3 de janeiro de 2007, D.O.U. 04.01.2007, *available at*

[http://www.planalto.gov.br/ccivil\\_03/LEIS/LCP/Lcp124.htm](http://www.planalto.gov.br/ccivil_03/LEIS/LCP/Lcp124.htm). (Brazil).

<sup>35</sup> Decreto No. 6.830, art. 1, de 27 de abril de 2009, D.O.U. de 28.04.2009. (Brazil); Lei Complementar No. 124, art. 2; *see also* Superintendência de Desenvolvimento da Amazônia (SUDAM): Legislação Sobre a Criação da Amazônia Legal, [http://www.ada.gov.br/index.php?Itemid=83&id=114&option=com\\_content&task=view](http://www.ada.gov.br/index.php?Itemid=83&id=114&option=com_content&task=view) (last visited March 13, 2010) (explaining the development of the *Amazônia Legal* and providing the list of current states). For a map of the *Amazônia Legal* *see* Ministério da Saúde: Painel Georeferenciado da Amazônia Legal, [http://portal2.saude.gov.br/portal/amazonia/area.cfm?id\\_area=590](http://portal2.saude.gov.br/portal/amazonia/area.cfm?id_area=590) (last visited March 13, 2010).

<sup>36</sup> English for “Floresta Amazônica.” In addition to Brazil, the Amazon Forest is located in Bolivia, Peru, Ecuador, Colombia, Venezuela, Guyana, Suriname, and the French Guiana. *Knowing the Amazon Region: The Heart of South America*, NEWSL. ACTO (Amazonian Cooperation Treaty Organization/In the Pursuit of the Continental Amazon, Brasília, Braz.), Year 1 – Nr. 1 – June/August 2004, at 8, *available at* [http://www.otca.org.br/arquivosdoc/informativo\\_otca1\\_eng.pdf](http://www.otca.org.br/arquivosdoc/informativo_otca1_eng.pdf).

<sup>37</sup> *See* Ministério do Meio Ambiente: Amazônia, <http://www.mma.gov.br/sitio/index.php?ido=conteudo.monta&idEstrutura=72&idMenu=3642> (last visited March 13, 2010).

<sup>38</sup> *Id.* at 37.

<sup>39</sup> *Id.*

<sup>40</sup> *See* Convention Biological Diversity: Brazil–Overview, <http://www.cbd.int/countries/?country=br> (last visited April 15, 2010).

<sup>41</sup> *See* Convention Biological Diversity: Why Does it Matter?, <http://www.cbd.int/forest/importance.shtml> (last visited April 15, 2010).

<sup>42</sup> Sara Scherr, *Marketing Conservation*, OUR PLANET: LIVING LEGACY—THE FUTURE OF THE FORESTS, Sept. 2008, at 20, *available at* <http://www.unep.org/pdf/ourplanet/OP-2008-09-en-FULLVERSION.pdf>. The rainforest hosts a great biodiversity of animal and plant life. *See* Rosemary Rayfuse, *Biological Resources*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 362, 363 (Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds. 2007). The cure to incurable and yet unknown diseases may very well be in the Amazon Forest as many plant species, and animals that teach us how to use these plants as medicine, are yet to be discovered. *See, e.g.* Eurípedes A. Funes, “*Nasci nas Matas, Nunca Tive Senhor*”: *História e Memória dos Mocambos do Baixo Amazonas*, in *supra* note 3, at 467, 481 (explaining that a *Quilombola* developed a antidote for snake bites after observing animals that chewed on certain plants after they were bitten by snakes). The Amazon Forest is also important because it provides subsistence to the many animal species that live there.

<sup>43</sup> *See, e.g.*, Eurípedes Funes, in *supra* note 42, at 467, 481–82 (describing the sustainable practices of the *Quilombolas*).

<sup>44</sup> Ministério do Meio Ambiente: Amazônia, *supra* note 37. Be they First Peoples, *babaqueiras*, *castanheiros*, *ribeirinhos*, or *seringueiros*, many developed their communities, culture, and sustainable practices in that region. *See id.* There are almost two-hundred thousand first peoples living in roughly 208 communities in the *Legal Amazônia* region. *See* Fundação Nacional do Índio: Etnias Indígenas, [http://www.funai.gov.br/mapas/mapa\\_etnia.htm](http://www.funai.gov.br/mapas/mapa_etnia.htm) (last visited March 13, 2010).

<sup>45</sup> Instituto Brasileiro de Geografia: Mapa da Amazônia Legal—Frente Agrícola, [ftp://geofp.ibge.br/mapas/tematicos/mapas\\_murais/fronteira\\_agricola.pdf](ftp://geofp.ibge.br/mapas/tematicos/mapas_murais/fronteira_agricola.pdf) (last visited March 13, 2010).

<sup>46</sup> *Id.*

<sup>47</sup> British Broadcasting Corporation: The Amazon in Graphics (12 May 2008), <http://news.bbc.co.uk/2/hi/americas/7360258.stm>.

<sup>48</sup> Instituto Brasileiro de Geografia, *supra* note 45.

<sup>49</sup> *Id.*; Convention Biological Diversity: Why Does it Matter?, *supra* note 41.

<sup>50</sup> The Amazon in Graphics, *supra* note 47.

<sup>51</sup> *Id.*

<sup>52</sup> *See* Alexei Barrionuevo, *Forest Plan in Brazil’s Amazon Bears the Traces of an Activist’s Vision*, N.Y. TIMES, Dec. 21, 2008, *available at* <http://www.nytimes.com/2008/12/22/world/americas/22brazil.html> (explaining that “the

burning and decomposition of trees produce carbon dioxide”); The Amazon in Graphics, *supra* note 47 (explaining effects of deforestation on global warming); *Defendant Says He Killed Union Leader*, N.Y. TIMES, Dec. 13, 1990, available at <http://www.nytimes.com/1990/12/13/world/defendant-says-he-killed-amazon-union-leader.html> (explaining that land for pastures and crops is cleared through slash and burn techniques).

<sup>53</sup> Elisabeth Rosenthal, *In Brazil, Paying Farmers to Let the Trees Stand*, N.Y. TIMES, Aug. 21, 2009, available at [http://www.nytimes.com/2009/08/22/science/earth/22degrees.html?\\_r=1](http://www.nytimes.com/2009/08/22/science/earth/22degrees.html?_r=1).

<sup>54</sup> *Id.* (explaining that forest fires destroy plants that absorb carbon dioxides emitted from cars and factories); The Amazon in Graphics, *supra* note 47 (explaining how deforestation hinders the forest’s carbon sink function).

<sup>55</sup> See Secretaria Especial de Políticas de Promoção da Igualdade Racial: Quilombos no Brasil, [http://www.presidencia.gov.br/estrutura\\_presidencia/seppir/copy\\_of\\_acoes/](http://www.presidencia.gov.br/estrutura_presidencia/seppir/copy_of_acoes/) (last visited March 13, 2010).

<sup>56</sup> See *id.* *Quilombo* derives from the Bantu *kilombo*, which is the equivalent of “settlement” or “fortress” in English. SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4 (quoting DICIONÁRIO DO BRASIL COLONIAL (1500-1808) 494 (Ronaldo Vainfas ed., 2000)). In Brazil, the *Quilombolas* and their territory were also referred to as *quilombos*, *mocambos*, *calhambolas*, or *mocambeiros*. João José Reis & Flávio dos Santos, *Uma História da Liberdade*, in *supra* note 3, at 9, 10. Under the English slavery system they were referred to as maroons; the Spanish, *palenques* or *cumbes*; the French, *grand marronage*, or *petit marronage*. *Id.*

<sup>57</sup> A discussion about the history of the *Quilombolas* in Brazil requires the understanding that accounts of the history of the *Quilombolas* were written by those outside their communities. Reis & Flávio, *supra* note 3. This generates inconsistencies and a history that may not be the accurate depiction of reality. *Id.*

<sup>58</sup> *Id.* at 9.

<sup>59</sup> See Comissão Pro-Índio de São Paulo: Escravidão e Resistência na Amazônia, [http://www.cpis.org.br/comunidades/html/brasil/pa/pa\\_escravida.html](http://www.cpis.org.br/comunidades/html/brasil/pa/pa_escravida.html) (last visited March 13, 2010).

<sup>60</sup> Lei No. 3.353, art. 1, de 14 de maio de 1888, *reprinted in* MINISTÉRIO DA CULTURA ET AL., DO TRÁFICO DE ESCRAVOS, AOS QUILOMBOS CONTEMPORÂNEOS (COLETÂNEA DE LEIS) 29 (1995). Even so, laws extinguishing the practice of slavery actually predated 1888. In 1831, the *Lei Diogo Feijó* declared that no more slaves could be brought to Brazil, and that those who continued to engage in slave trafficking would be punished. Lei de 7 de Novembro de 1831, arts. 1–2, *reprinted in id.* at 13. Nineteen years later, *Lei Euzébio de Queiróz* was a second attempt to prohibit the traffic of slaves, which continued even after the passage of *Lei Diogo Feijó*. See Lei No. 581, de 4 de Setembro de 1850, *reprinted in id.* at 15. For example, *Lei Euzébio de Queiróz* imposed sanctions in situations where ships displayed signs identifying them as ships used for the trafficking of slaves. Art. 1, *reprinted in id.* *Lei do Ventre Livre*, Portuguese for “law of the free womb,” provided for the freedom of children of slaves born after 1871, the year the law was passed. See Lei No. 2.040, art. 1, de 28 de Setembro de 1871, *reprinted in id.* at 19. However, this law had its inconsistencies. It provided that once the children born of slaves became eight years old, the children would still have to work for the slave master until the age of twenty-one. Art. 1, § 1, *reprinted in id.* For a more thorough discussion of *Lei Ventre*, see Arethusa Helena Zero: Ingênuos, Libertos, Órfãos e a Lei do Ventre Livre, [http://www.abphe.org.br/congresso2003/Textos/Abphe\\_2003\\_76.pdf](http://www.abphe.org.br/congresso2003/Textos/Abphe_2003_76.pdf) (last visited March 13, 2010). Three years before Lei Áurea was passed, *Lei dos Sexagenário* established rules to register basic facts about slaves, ranging from their names to their occupations, and estimated value. Lei No. 3270, de 28 de setembro de 1885, art. 1, §§ 1, 3, *reprinted in id.* at 23. Additionally, Article 3 of *Lei dos Sexagenário* provided compensation by the state to slave masters who freed their slaves. *Id.*

<sup>61</sup> United Nations Division for the Advancement of Women: *Brazil’s Response to the Questionnaire on the Application of the Beijing Platform for Action (1995) and the Results of the Twenty-Third Period of the Extraordinary Sessions of the General Assembly (2000)*, <http://www.un.org/womenwatch/daw/Review/responses/BRAZIL-English.pdf> (last visited March 20, 2010).

<sup>62</sup> Secretaria Especial de Políticas de Promoção da Igualdade Racial, *supra* note 55.

<sup>63</sup> Conservative calculations based on diverse data reveal there are at least 340 *Quilombolas* communities in the *Amazônia Legal*. See Fundação Cultural Palmares: Certidões Atualizadas, [http://www.palmares.gov.br/005/00502001.jsp?ttCD\\_CHAVE=92&btImprimir=SIM](http://www.palmares.gov.br/005/00502001.jsp?ttCD_CHAVE=92&btImprimir=SIM) (last visited March 13, 2010); Comissão Pro-Índio de São Paulo: Terras Quilombolas, <http://www.cpis.org.br/terras/Mapa/mapa.asp?VerTerras=t> (last visited March 13, 2010); Comissão Pro-Índio de São Paulo: Comunidades Quilombolas do Estado do Pará, [http://www.cpis.org.br/comunidades/html/i\\_brasil\\_pa.html](http://www.cpis.org.br/comunidades/html/i_brasil_pa.html) (last visited March 13, 2010).

<sup>64</sup> See Coordenação Nacional de Articulação das Comunidades Quilombolas: Quilombolas no Brasil, <http://www.conaq.org.br/> (follow “Quilombolas no Brasil” hyperlink) (last visited March 13, 2010).

<sup>65</sup> Comissão Pro-Índio de São Paulo: Comunidades Quilombolas do Estado do Para

[http://www.cpispp.org.br/comunidades/html/i\\_brasil\\_pa.html](http://www.cpispp.org.br/comunidades/html/i_brasil_pa.html) (last visited March 13, 2010).

<sup>66</sup> See Fundação Cultural Palmares: *Quilombolas Querem Mostrar ao Mundo Quem Cuida da Amazônia*, (Jan. 27, 2009) [http://www.palmares.gov.br/003/00301009.jsp?ttCD\\_CHAVE=1879](http://www.palmares.gov.br/003/00301009.jsp?ttCD_CHAVE=1879); Eurípedes Funes, in *supra* note 42, at 467, 481–82 (explaining *Quilombolas* sustainable practices).

<sup>67</sup> See Fundação Cultural Palmares: *Quilombolas Querem Mostrar ao Mundo Quem Cuida da Amazônia*, *supra* note 66; Eurípedes Funes, in *supra* note 42, at 467, 481–82 (explaining *Quilombolas* sustainable practices); Grupo de Trabalho Amazônico: Cartilha Resgata Sabedoria de Ervas Medicinais, <http://www.gta.org.br/amazonia> (last visited April 17, 2010).

<sup>68</sup> Eurípedes Funes, in *supra* note 42, at 467, 481–82.

<sup>69</sup> See Rayfuse, *supra* note 42 and accompanying text.

<sup>70</sup> See *supra* notes 40–43, and accompanying text.

<sup>71</sup> See *supra* notes 42–44 and accompanying text; Part III.B.

<sup>72</sup> Ato das Disposições Constitucionais Transitórias, art. 68, de 5 de outubro de 1988, D.O.U. de 05.10.1988. (Brazil).

<sup>73</sup> E-mail from Suellen Tatiane de Oliveira Rodrigues, attorney at law in Brazil, to author (October 21, 2009, 17:53 MST) (on file with author).

<sup>74</sup> *Id.*

<sup>75</sup> Ato das Disposições Constitucionais Transitórias, art. 68, de 5 de outubro de 1988.

<sup>76</sup> English for “Movimento Negro.” This term refers to the collective work of Afro-Brazilians toward better human rights for Brazilians of African descent and all Brazilians in general.

<sup>77</sup> SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 56, at 9.

<sup>78</sup> Leandro Mitidieri Figueiredo, *Direito Constitucional dos Remanescentes de Quilombos à Propriedade de Suas Terras*, in O INCRA E OS DESAFIOS PARA A REGULARIZAÇÃO DOS TERRITÓRIOS QUILOMBOLAS 57, 58 (Rejane de Meneses & Yana Palankof eds., 2006), available at <http://www.nead.org.br/index.php?acao=biblioteca&publicacaoID=352> (follow “Obter Documento” hyperlink); SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 56, at 7.

<sup>79</sup> See *infra* note 199 and accompanying text.

<sup>80</sup> See *supra* notes 72–75 and accompanying text.

<sup>81</sup> Compare Decreto No. 4.887, art. 2, § 1, de 20 de novembro de 2003, D.O.U. de 21.11.2003 (Brazil) (establishing that the characterization of “remnants of communities of *quilombo*” are decided by the *Quilombolas* themselves), with Decreto No. 3.912, art. 2, ¶¶ 1–2, de 10 de setembro de 2001, D.O.U. de 11.09.2001 (Brazil) (defining “remnants of communities of *quilombos*” as those communities that occupied property in 1888 and in 1988).

<sup>82</sup> See Mitidieri, *supra* note 78, at 59; SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4, at 81–82.

<sup>83</sup> See Ato das Disposições Constitucionais Transitórias, art. 68, de 5 de outubro de 1988, D.O.U. de 05.10.1988 (author’s translation). (Brazil).

<sup>84</sup> Decreto No. 4.887 grants the *Quilombolas* with the “collective and pro-indivisible” right to land. Decreto No. 4.887, art. 17, de 20 de novembro de 2003; see Mitidieri, *supra* note 78, at 59; SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4, at 81–82.

<sup>85</sup> See Decreto No. 4.887, art. 17; Mitidieri, *supra* note 78, at 59; SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4, at 81–82.

<sup>86</sup> “The International Labour Organization (ILO) is devoted to advancing opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity.” International Labor Organization: About the ILO, [http://www.ilo.org/global/About\\_the\\_ILO/lang--en/index.htm](http://www.ilo.org/global/About_the_ILO/lang--en/index.htm) (last visited March 20, 2010).

<sup>87</sup> See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 1, ¶ 2, arts. 13–19, 1650 U.N.T.S. 383 (June 27, 1989) [hereinafter ILO Convention No. 169]. Brazil ratified the convention by means of decree. See Decreto No. 5.051, de 19 de abril de 2004, D.O.U. de 20.04.2004. (Brazil). Brazil expressly recognizes the *Quilombolas* as tribal peoples as rules addressing *Quilombolas* land rights have made direct references to ILO 169. See, e.g., Instrução Normative INCRA No. 56, art. 1, ¶ XII, de 7 de outubro de 2009, D.O.U. de 10.09.2009. (Brazil).

<sup>88</sup> See ILO Convention No. 169, art. 13, ¶ 1, *supra* note 87, 1650 U.N.T.S. at 383. The land is also considered important for the community’s spiritual development. See *id.*



<sup>89</sup> *Id.* at pmb., 1650 U.N.T.S. at 383.

<sup>90</sup> *Id.* at art. 23, ¶ 1, 1650 U.N.T.S. at 383.

<sup>91</sup> *Id.* at pmb., 1650 U.N.T.S. at 383; Fundação Cultural Palmares: Quilombolas Querem Mostrar ao Mundo Quem Cuida da Amazônia, *supra* note 676. ILO Convention No. 169 provisions on the progress of culture and self-identification provision already influenced key legislation addressing *Quilombolas* right to land. *See* Decreto No. 4.887, de 20 de novembro de 2003, D.O.U. de 21.11.2003. (Brazil). *Decreto No. 4.887* revoked *Decreto No. 3.912*, which impaired their ability to qualify for land under ADCT 68. *Id.* at art. 25; *see* Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas: Manifesto Pelos Direitos Quilombolas, [http://www.app.com.br/portallapp/uploads/publicacoes/manifesto\\_direito\\_quilombola.pdf](http://www.app.com.br/portallapp/uploads/publicacoes/manifesto_direito_quilombola.pdf) (last visited April 15, 2010). *Decreto No. 4.887*, which is still in force today, provides for the right of self-identification, and recognizes Quilombolas land as a cultural patrimony. *Decreto No. 4.887*, art. 2, § 1, art. 18, de 20 de novembro de 2003; *see infra* note 98 and accompanying text.

<sup>92</sup> *See* C.F. arts. 215–16. (Brazil).

<sup>93</sup> *Id.* at art. 215, § 1.

<sup>94</sup> English for “Plano Nacional da Cultura.”

<sup>95</sup> *See* C.F. art. 215, § 3. This provision was amended to the *Constituição*. *See* Emenda Constitucional No. 48, art. 1, § 3, de 10 de agosto de 2005, D.O.U. de 11.08.2005. (Brazil).

<sup>96</sup> *Id.* at art. 216 (Author’s translation).

<sup>97</sup> English for “Fundação Cultural Palmares.” The Palmares Cultural Foundation mission “embodies the constitutional precepts of reinforcing citizenship, the identity, the action and the memory of the ethnic segments of the groups that form the Brazilian society, adding, also, the right to access culture and the indispensable action of the State in the preservation of the afro-Brazilian manifestations;” “[the foundation] formulates and implements public politics that have the objective of [maximizing] the participation of the black Brazilian population in the process of the development, [based on] their history and culture.” Fundação Cultural Palmares: Apresentação [http://www.palmares.gov.br/follow “Apresentação”](http://www.palmares.gov.br/follow/Apresentação) hyperlink under “Institucional”) (last visited April 15, 2010) (author’s translation).

<sup>98</sup> *See* Decreto No. 4.887, art. 18, de 20 de novembro de 2003, D.O.U. de 21.11.2003 (author’s translation).

<sup>99</sup> The IPHAN is the the *Instituto do Patrimônio Histórico e Artístico Nacional*, Portuguese for “Institute of the National Historical and Artistic Patrimony.” The IPHAN “is a federal government [entity] connected to the *Ministério da Cultura*, responsible for preserving the diversity of contributions of the different elements that compose the Brazilian society and its ecosystems. This responsibility includes [the duty to] preserve, diffuse and inspect the Brazilian cultural assets, as well as secure the [preservation] and enjoyment of these assets to present and future generations.” Instituto do Patrimônio Histórico e Artístico Nacional: IPHAN, <http://portal.iphan.gov.br/portal/montarPaginaSecao.do?id=10&sigla=Institucional&retorno=paginaIphan> (last visited April 15, 2010) (author’s translation). The IPHAN was created by “Brazilian intellectuals and artists connected to the modernist movement. It was the beginning of a desire that dated in the seventeenth century to protect the historical monuments”; “[t]he creation of the Institution obeys a normative principle, currently contemplated by article 216 of the [*Constituição*]. . .” Instituto do Patrimônio Histórico e Artístico Nacional: A Instituição, <http://portal.iphan.gov.br/portal/montarPaginaSecao.do?id=11175&retorno=paginaIphan> (last visited April 15, 2010) (author’s translation).

<sup>100</sup> *See* Decreto No. 4.887, art. 18, de 20 de novembro de 2003 (author’s translation).

<sup>101</sup> UNESCO is the United National Educational, Scientific and Cultural Organization. Its mission is not just to “build classrooms in devastated countries or to publish scientific breakthroughs. Educations, Social and Natural Science, Culture and Communication are the means to far more ambitious: to build peace in the minds of men.” United National Educational, Scientific and Cultural Organization: About UNESCO, [http://portal.unesco.org/en/ev.php-URL\\_ID=3328&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=3328&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited April 10, 2010). Perhaps it could have said “humans,” “peoples,” or another gender-neutral term if we are, indeed, to be that advanced.

<sup>102</sup> Records of the General Conference, October 15–November 13, 2001, Universal Declaration on Cultural Diversity, art. 4, U.N. Doc. 31/C/Res. 15. Brazil did not ratify this instrument because “[declarations] are not subject to ratification[,]” but rather, they “they set forth universal principles to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support.” *See* UNESCO:

General introduction to the standard-setting instruments of UNESCO, [http://portal.unesco.org/en/ev.php-URL\\_ID=13179&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.htm](http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.htm) (last visited April 17, 2010).

<sup>103</sup> Universal Declaration on Cultural Diversity pmb., *supra* note 102.

<sup>104</sup> *See id.*

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* at art. 1.

<sup>107</sup> *Id.* at art. 2.

<sup>108</sup> *Id.* at art. 3.

<sup>109</sup> *See* Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, U.N. Doc. CLT-2005/CONVENTION DIVERSITE-CULT REV. Brazil ratified this Convention by means of legislative decree. *See* Decreto Legislativo No. 485, 20 de dezembro de 2006, D.O.U. de 22.12.2006. (Brazil).

<sup>110</sup> *See* Convention on the Protection and Promotion of the Diversity of Cultural Expressions pmb., *supra* note 109.

<sup>111</sup> *See id.*

<sup>112</sup> *See id.*

<sup>113</sup> *See id.*

<sup>114</sup> *See* Ato das Disposições Constitucionais Transitórias, art. 68, de 5 de outubro de 1988, D.O.U. de 05.10.1988. (Brazil).

<sup>115</sup> *See supra* notes 72–75 and accompanying text.

<sup>116</sup> *See* Fundação Cultural Palmares: Mobilização Nacional em Defesa dos Direitos Quilombolas, [http://www.palmares.gov.br/003/00301009.jsp?ttCD\\_CHAVE=2360](http://www.palmares.gov.br/003/00301009.jsp?ttCD_CHAVE=2360) (last visited April 15, 2010); Coordenação Nacional de Articulação das Comunidades Quilombolas: Quilombolas no Brasil, <http://www.conaq.org.br/> (follow “Objetivos” hyperlink under “Sobre a Conaq”) (last visited April 15, 2010).

<sup>117</sup> *See* Comissão Pro-Índio de São Paulo: Terras Quilombolas, *supra* note 63. This number is even lower for titles granted by the Federal Government. *See id.*

<sup>118</sup> This is estimated is based on the accounts that are up to 5,000 *Quilombolas* communities, and 144 communities obtained title to land. *See* Secretaria Especial de Políticas de Promoção da Igualdade Racial, *supra* note 55; Comissão Pro-Índio de São Paulo: Por Que as Titulações Não Acontecem?, [http://www.cpsp.org.br/terras/html/pesquisa\\_porque.asp](http://www.cpsp.org.br/terras/html/pesquisa_porque.asp) (last visited April 15, 2010).

<sup>119</sup> *See* Comissão Pro-Índio de São Paulo: Por Que as Titulações Não Acontecem?, *supra* note 118.

<sup>120</sup> Portuguese for “administrative rule.”

<sup>121</sup> Portaria No. 307, de 22 de novembro de 2004, *available at*

<http://www.cpsp.org.br/hm/leis/page.aspx?LeiID=14>. Administrative rule 307 provided that *INCRA*—in accordance with ADCT 68—should measure, demark, and register by “means of concession of title of recognition” property occupied by the *Quilombolas*. *Id.* at art. 1.

<sup>122</sup> *See* SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4, at 24.

<sup>123</sup> English for “Medida Provisória.” DURVAL DE NORONHA GOYOS JR., NORONHA’S LEGAL DICTIONARY 24 (1st ed. 1999).

<sup>124</sup> English for “Ministério da Cultura.” The Ministry of Culture considers “culture in addition to being a fundamental and irreplaceable element in the construction of the own national identity, is increasingly, [a distinguished] sector in the economy of the [c]ountry, as a source of increasing generation of employment and funds.” Ministério da Cultura: Histórico do Ministério, <http://www.cultura.gov.br/site/sobre/historico-do-ministerio-da-cultura/> (last visited April 15, 2010) (author’s translation).

<sup>125</sup> *See* Medida Provisória No. 1.911-11, art. 14, ¶ IV, subpara. c, de 26 de outubro de 1999, D.O.U. de 27.10.1999. (Brazil).

<sup>126</sup> *See* Portaria No. 447, art. 1, de 02 de dezembro de 1999, *available at* <http://www.cultura.gov.br/site/wp-content/uploads/2007/11/portaria-447-de-1999.pdf>.

<sup>127</sup> *See* Lei No. 7.668, de 22 de agosto de 1988, D.O.U. de 23.08.1988. (Brazil).

<sup>128</sup> *See* Decreto No. 3.912, de 10 de setembro de 2001, D.O.U. de 11.09.2001. (Brazil); Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas: Manifesto Pelos Direitos Quilombolas, *supra* note 91.

<sup>129</sup> Decreto No. 3.912, art. 1, ¶¶ I–II, de 10 de setembro de 2001. *Decreto 3.912* was issued by President Fernando Henrique Cardoso, who himself was among the drafters of *Constituição*. *See* Decreto No. 3.912, de 10 de setembro de 2001. The *Movimento Negro* was also directly involved in creating the *Constituição* of 1988. *See* SOCIEDADE BRASILEIRA DE DIREITO PÚBLICO, *supra* note 4, at 9.

<sup>130</sup> Cláudio Teixeira da Silva: O Usucapião Singular Disciplinado no Art. 68 do Ato das Disposições Constitucionais Transitórias, [http://www.planalto.gov.br/ccivil\\_03/revista/Rev\\_28/artigos/Art\\_Claudio.htm](http://www.planalto.gov.br/ccivil_03/revista/Rev_28/artigos/Art_Claudio.htm) (last visited April 15, 2010).

<sup>131</sup> Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas: Manifesto Pelos Direitos Quilombolas, *supra* note 91. It also did not consider whether they had to leave their territory because others interfered with their land rights; nor did it consider that even though *Lei Áurea* passed, slavery continued nonetheless and they left to establish the *quilombolas*. The lack of implementation of the laws abolishing slavery before *Lei Áurea* was passed demonstrate why this was likely an issue. See *supra* notes 60 and accompanying text.

<sup>132</sup> Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas: Manifesto Pelos Direitos Quilombolas, *supra* note 91; see Decreto No. 4.887, art. 25, de 20 de novembro de 2003, D.O.U. de 21.11.2003. (Brazil).

<sup>133</sup> Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas: Manifesto Pelos Direitos Quilombolas, *supra* note 91.

<sup>134</sup> See Decreto No. 4.887, art. 1, de 20 de novembro de 2003.

<sup>135</sup> *Id.* at art. 2, § 1.

<sup>136</sup> See Ação Direta de Inconstitucionalidade (ADI) No. 3.239: Decreto No. 4.887, *available at* <http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoicidente=2227157> (follow “Petição Inicial” hyperlink).

<sup>137</sup> See Projeto de Decreto Legislativo 44, de 2007, art. 1, *available at* <http://www.camara.gov.br/sileg/integras/460993.pdf>.

<sup>138</sup> See Projeto de Lei No. 6.264, art. 1, § 4, ¶¶ I–II, de 2005, *available at* <http://www.camara.gov.br/sileg/integras/593419.pdf> (reinstating terms of decree No. 3.912).

<sup>139</sup> See Projeto de Lei No. 3.654, de 2008, Justificação, *available at* <http://www.camara.gov.br/sileg/integras/582627.pdf>.

<sup>140</sup> See Observatório Quilombola: Dossiê Imprensa Anti-Quilombola, [http://www.koinonia.org.br/OQ/dossies\\_detalhes.asp?cod\\_dossie=2](http://www.koinonia.org.br/OQ/dossies_detalhes.asp?cod_dossie=2) (last visited April 15, 2010).

<sup>141</sup> Various groups, including entities of the Brazilian government, expressed their disapproval of ADI No. 3.239. See, e.g., ADI No. 3.239, *supra* note 136 (follow “Petição 90123/2009). The legislative actions against the Decreto did not go far either. *Quilombolas* advocates also made public their disapproval of legislative actions and the media’s impartial behavior. See Ministério Público: Parecer Contrário ao Projeto Legislativo No. 44, de 2007, *available at* [http://ccr6.pgr.mpf.gov.br/documentos-e-publicacoes/artigos/documentos-e-publicacoes/docs\\_artigos/parecer\\_contrario\\_walter\\_rothemburg.pdf](http://ccr6.pgr.mpf.gov.br/documentos-e-publicacoes/artigos/documentos-e-publicacoes/docs_artigos/parecer_contrario_walter_rothemburg.pdf); Observatório Quilombola: Dossiê Imprensa Anti-Quilombola, *supra* note 140.

<sup>142</sup> Instrução Normativa Incra No. 49, de 29 de setembro de 2008, D.O.U. de 01.10.2008 (Brazil); see also Ana Carolina da Matta Chasin & Daniela Carolina Perutti: Os Retrocessos Trazidos pela Instrução Normativa do Incra n.º 49/2008 na Garantia

dos Direitos das Comunidade Quilombolas,

<http://www.cpis.org.br/acoes/upload/arquivos/ARTIGO%20IN%2049.pdf> (last visited April 15, 2010) (stating that administrative rule No. 56 benefits the *Quilombolas*).

<sup>143</sup> See Instrução Normativa Incra No. 49, art. 6, ¶ 1, de 29 de setembro de 2008; See Instrução Normativa Incra No. 49, art. 6, ¶ 1, art. 9, de 29 de setembro de 2008; see also *supra* note 142 (stating that “IN no. 49/2008 also brought a series of new requirement for the elaboration of the studies of identification of the territory, which will create an incalculable backlog in the finalization of Technical Report of Identification and Delineation.”)

<sup>144</sup> See Instrução Normativa Incra No. 56, art. 32, de 7 de outubro de 2009, D.O.U. de 09.10.2009. (Brazil).

Although administrative rule No. 56 is similar to administrative rule No. 49, it was nonetheless perceived as beneficial for the *Quilombolas*. Compare Instrução Normativa Incra No. 56, art. 6 parágrafo único, 9, de 7 de outubro de 2009 (providing for the certification of the self-identification process and demarcation of territory), with Instrução Normativa Incra No. 49, art. 6, ¶ 1, 9, de 29 de setembro de 2008 (providing for the certification of the self-identification process and demarcation of territory), but see Pro-Índio de São Paulo (CSISP): Direitos Ameaçados, [http://www.cpis.org.br/htm/leis/legislacao\\_federal.aspx?LinkID=53](http://www.cpis.org.br/htm/leis/legislacao_federal.aspx?LinkID=53) (last visited April 15, 2010) (describing that administrative rule No. 56 to a limited extent favored the *Quilombolas*).

<sup>145</sup> See Instrução Normativa Incra No. 57, de 20 de outubro de 2009, *available at* <http://www.cpis.org.br/htm/leis/page.aspx?LeiID=184>.

<sup>146</sup> See *supra* notes 121–127 and accompanying text.

<sup>147</sup> See *infra* Part VI.

<sup>148</sup> This is in an area equivalent to 670,000 square kilometers.

<sup>149</sup> Presidência da República: Exposição de Motivos, ¶ 3, [https://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2009/Exm/EMI-1-MDA-MP-MCidades-09-Mpv-458.htm](https://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Exm/EMI-1-MDA-MP-MCidades-09-Mpv-458.htm) (last visited March 18, 2010).

<sup>150</sup> Michelle Austein Brooks: Texas is “Like a Whole Other Country” (27 February 2009), <http://www.america.gov/st/usg-english/2009/February/20090227171936hmnetsua0.7023737.html&distid=ucs> (stating that the Texas is “at nearly 681,000 square kilometers”).

<sup>151</sup> Presidência da República: Exposição de Motivos, *supra* note 149, ¶ 10.

<sup>152</sup> See Medida Provisória No. 458, de 10 de fevereiro de 2009, D.O.U. de 11.02.2009. (Brazil).

<sup>153</sup> English for “projeto de lei de conversão.”

<sup>154</sup> Presidência da República: Exposição de Motivos, *supra* note 149, ¶¶ 2–3.

<sup>155</sup> *Id.* ¶ 4.

<sup>156</sup> English for “Ministério do Desenvolvimento Agrário.” The MDA duty is to promote “the agrarian reform; [promote] the sustainable development of the rural segment constituted by family [farmers]; and [the] identification, recognition, demarcation and [title registration] of lands occupied by the remnants of quilombos.” Decreto No. 6.813, anexo art. 1, ¶ III, de 3 de abril 2009, D.O.U. de 03.04.2009, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2009/Decreto/D6813.htm](http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Decreto/D6813.htm). (Brazil).

<sup>157</sup> INCRA is the *Instituto Nacional de Colonização e Reforma Agrária*, or in English, the National Institute of Colonization and Agrarian Reform. INCRA’s mission is to “[i]mplement the politics of agrarian reform and [effectuate] national land organization, while contributing to sustainable rural development.” Instituto Nacional de Colonização e Reforma Agrária: Missão e Visão, [http://www.incra.gov.br/portal/index.php?option=com\\_content&view=category&layout=blog&id=35&Itemid=54](http://www.incra.gov.br/portal/index.php?option=com_content&view=category&layout=blog&id=35&Itemid=54) (last visited March 18, 2010) (author’s translation).

<sup>158</sup> See Presidência da República: Exposição de Motivos, *supra* note 149, ¶ 4.

<sup>159</sup> See Medida Provisória No. 458, art. 4, ¶ 2, de 10 de fevereiro de 2009, D.O.U. de 11.02.2009. (Brazil).

<sup>160</sup> See Projeto de Lei de Conversão No. 9, art. 4, ¶ II, de 2009, *available at* <http://legis.senado.gov.br/mate-pdf/59949.pdf>.

<sup>161</sup> Lei No. 11.952, art. 4, § 2, de 25 de junho de 2009; *see also* Ação Direta de Inconstitucionalidade (ADI) No. 4.269: Lei No. 11.952,

<http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2689764> (follow “PETIÇÃO INICIAL” hyperlink) (last visited March 18, 2010) (explaining how Lei 11.952 may permit regularization of *Quilombola* territory in favor of third parties).

<sup>162</sup> See Medida Provisória No. 458, de 2009, Mensagem No. 61/2009: Emendas Apresentadas por Parlamentares, *available at* <http://www.camara.gov.br/sileg/integras/651295.pdf>.

<sup>163</sup> See Mensagem No. 488, de 25 de junho de 2009, D.O.U. de 26.06.2009, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2009/Msg/VEP-488-09.htm](http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Msg/VEP-488-09.htm). (Brazil).

<sup>164</sup> The General Prosecutor is part of the *Ministério Público Federal*.

The [Federal] Public Ministry is not part of any of the three powers—[e]xecutive, [l]egislative and [j]udiciary. The [MPF] possesses autonomy of structure from the State, it cannot be extinguished or have its attribution passed to another institution. The [prosecutors] have the function independence assured by the *Constituição*. Thus, they are subordinate to one chief only in administrative terms, but each member is free to act according to her conscience and convictions, based on the law. The [prosecutors] can defend citizens against eventual abuses and omissions by the Public Power as well as defend the public patrimony against attacks of individuals of bad faith. Ministério Público Federal: Sobre o Ministério Público Federal, [http://www.pgr.mpf.gov.br/o\\_mpf/sobre\\_o\\_mpf](http://www.pgr.mpf.gov.br/o_mpf/sobre_o_mpf) (last visited April 15, 2010) (author’s translation).

<sup>165</sup> See ADI No. 4.269, *supra* note 161.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> The General Prosecutor stated that the Declaration on Diversity and the Convention on Cultural Expressions are very similar to the articles of the *Constituição* in that they incorporate a concept of culture that embodies a collectivity of values, representations, and regulation of life that guide the diverse social groups. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Specifically, she compared article 215 of the Federal Constitution with article 4 of the Universal Declaration on Diversity and article 5 of the Convention on the Diversity of Cultural Expressions. *Id.* Then, she compared article 215 with the ILO No. 169. *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> Portuguese for “Advocacia-Geral da União.” “In the terms of art. 131 of the *Constituição* ‘the General Advocate of the Union is the institution that, directly or through a related organ, represents the Union, judicially and extrajudicially.’” See Advocacia Geral da União: Funções Institucionais

[http://www.agu.gov.br/Sistemas/Site/PaginasInternas/Institucional/func\\_inst.aspx](http://www.agu.gov.br/Sistemas/Site/PaginasInternas/Institucional/func_inst.aspx) (last visited March 18, 2010).

<sup>173</sup> See Advocacia Geral da União (July 23, 2009): Ação Direta de Inconstitucionalidade No. 4.269, available at <http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2689764> (follow “PETIÇÃO (92220/2009) - PR - presta informações” hyperlink).

<sup>174</sup> See *supra* note 159 and accompanying text.

<sup>175</sup> See Ato das Disposições Constitucionais Transitórias, art. 68, de 5 de outubro de 1988, D.O.U. de 05.10.1988. (Brazil).

<sup>176</sup> See *supra* notes 82–84 and accompanying text.

<sup>177</sup> See *supra* Part III.A.

<sup>178</sup> See *supra* Part III.A.

<sup>179</sup> See *supra* notes 82–84 and accompanying text.

<sup>180</sup> See *supra* Part III.C.

<sup>181</sup> “As of the [ninth] day of this month the Program Legal Land already delivered 232 [titles to land] and registered 11.308 occupations in more than [two] million hectares of land in the 120 days of work.” See Terra Amazônia Legal: Coordenação Nacional do Terra Legal Anuncia Metas para 2010 (10/22/2009), available at [http://portal.mda.gov.br/terralegal/noticias/item?item\\_id=3063879](http://portal.mda.gov.br/terralegal/noticias/item?item_id=3063879) (author’s translation). Conversely, title to land granted under ADCT 68 does not equal even half of this number. See *supra* note 117–118 and accompanying text.

<sup>182</sup> See *supra* note 156.

<sup>183</sup> See *supra* note 117–119 and accompanying text.

<sup>184</sup> See Terra Amazônia Legal: Sobre o Programa, <http://portal.mda.gov.br/terralegal/> (last visited March 18, 2010).

<sup>185</sup> Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 7, ¶ 1, *supra* note 87, 1650 U.N.T.S. at 383.

<sup>186</sup> See *supra* Part III.B.

<sup>187</sup> See C.F. art. 215, § 1. (Brazil).

<sup>188</sup> See Decreto No. 4.887, art. 18, ¶ 1, de 20 de novembro de 2003, D.O.U. de 21.11.2003 (Brazil); C.F. art. 216; see also ADI No. 4.269, *supra* note 161 (stating that the physical territory is imminent to the group’s identity); Bernard and Audre Rapoport Center for Human Rights and Justice, Between the Law and Their Land: Afro-Brazilian Quilombo Communities’ Struggle for Land Rights (September 22, 2008), [http://www.utexas.edu/law/academics/centers/humanrights/projects\\_and\\_publications/brazil-report.pdf](http://www.utexas.edu/law/academics/centers/humanrights/projects_and_publications/brazil-report.pdf) (stating that “quilombo lands are to be considered ‘Afro-Brazilian Cultural Territory’ and should be protected as a national public good.”).

<sup>189</sup> Because Decreto 4.887 is currently being challenged as unconstitutional, this understanding may cease to exist unless another law is passed that expressly provides that *Quilombolas* territory is a cultural patrimony. See Decreto No. 4.887, art. 18, ¶ 1, de 20 de novembro de 2003, D.O.U. de 21.11.2003 (Brazil); Ação Direta de Inconstitucionalidade No. 3.239: Decreto No. 4.887, *supra* note 136.

<sup>190</sup> See ILO Convention No. 169 art. 13, ¶ 1, *supra* note 87, 1650 U.N.T.S. at 383.

<sup>191</sup> See *supra* Part III.A.

<sup>192</sup> “We serve the law. We teach it, study it, practice it, and work to make it just.” This is the mission of the William Mitchell College of Law. William Mitchell College of Law: Mission and Vision, <http://www.wmitchell.edu/about/mission.html> (last visited Oct. 24, 2009).

<sup>193</sup> See *supra* note 181 and accompanying text.

<sup>194</sup> See *supra* Part III.A.

<sup>195</sup> See *supra* Part III.C.

<sup>196</sup> See *supra* note 181 and accompanying text.

<sup>197</sup> See *supra* Part III.A.

<sup>198</sup> See *supra* Part III.A–B.

<sup>199</sup> See Secretaria Especial de Políticas de Promoção da Igualdade Racial: Defensores Públicos São Capacitados para Lidar com a Questão Quilombola, [http://www.presidencia.gov.br/estrutura\\_presidencia/seppir/noticias/ultimas\\_noticias/capacitacaodefensores\\_questao\\_quilombola/](http://www.presidencia.gov.br/estrutura_presidencia/seppir/noticias/ultimas_noticias/capacitacaodefensores_questao_quilombola/) (last visited March 19, 2010).

<sup>200</sup> See, e.g., Coordenação Nacional de Articulação das Comunidades Quilombolas: Quilombolas no Brasil, *supra* note 116.

<sup>201</sup> Though most applicable to cases involving criminal issues, the principles outlined in it are nonetheless relevant to the discussion of *Quilombolas* rights under the law. See Basic Principles on the Role of Lawyers, Eighth United Nations Congress on the Prevention and the Treatment of Offenders, Havana, Aug. 27–Sept. 7, 1990, U.N. Doc A/CONF.144/28 (1990).

<sup>202</sup> *Id.* at pmb1.

<sup>203</sup> *Id.* ¶ 4.

<sup>204</sup> *Id.*

<sup>205</sup> Comissão Pro-Índio de São Paulo: Communiqué Regarding the Fulfillment by the Brazilian Government of ILO Convention 169 Addressing Indigenous and Tribal Peoples, [http://www.cpsp.org.br/acoes/upload/arquivos/C169%20OIT\\_%20english.pdf](http://www.cpsp.org.br/acoes/upload/arquivos/C169%20OIT_%20english.pdf) (last visited April 15, 2010).

<sup>206</sup> See *supra* Part III.B–C.

<sup>207</sup> See *supra* Part III.B–C.

<sup>208</sup> English translation for “Plano Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais” [hereinafter Plan of Sustainable Development].

<sup>209</sup> Decreto No. 6.040, de 7 de fevereiro de 2007, D.O.U. de 08.02.2009, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2007/Decreto/D6040.htm\\_\(Brazil\)](http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2007/Decreto/D6040.htm_(Brazil)).

<sup>210</sup> *Id.* at art 3, ¶¶ I–II.

<sup>211</sup> *Id.* at art 3, ¶ I.

<sup>212</sup> *Id.* at art. 3, ¶ III and at anexo, art. 2.

<sup>213</sup> *Id.* at art 3, ¶ II.

<sup>214</sup> See *Id.* at anexo, art. 3, ¶ I.

<sup>215</sup> *Id.* at art 3, ¶¶ II–XVII.

<sup>216</sup> See Decreto No. 6.872, eixo 6, de 4 de Junho de 2009, D.O.U. de 04.06.2009, *available at* [http://www.planalto.gov.br/ccivil\\_03/\\_Ato2007-2010/2009/Decreto/D6872.htm\\_\(Brazil\)](http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2009/Decreto/D6872.htm_(Brazil)).

<sup>217</sup> *Id.* at axis 6, ¶ I.

<sup>218</sup> *Id.* ¶ II.

<sup>219</sup> *Id.* ¶ III.

<sup>220</sup> *Id.* ¶ IV.

<sup>221</sup> *Id.* ¶ V.

<sup>222</sup> *Id.* ¶ VI.

<sup>223</sup> *Id.* ¶ VII.

<sup>224</sup> *Id.* ¶ VIII.

<sup>225</sup> *Id.* ¶ IX.

<sup>226</sup> *Id.* ¶ X.